

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Time Warner Cable Inc.	)	CSR 7726-E
	)	CSR 7722-E
Petitions for Determination of Effective	)	
Competition in Various Pennsylvania	)	
Communities	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 7, 2008**

**Released: May 8, 2008**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Time Warner Cable Inc. ("Time Warner"), hereinafter referred to as "Petitioner," has filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(1) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as "Communities." Petitioner alleges that its cable systems serving the communities listed on Attachment B and hereinafter referred to as "Group B Communities" are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended ("Communications Act")<sup>1</sup> and the Commission's implementing rules,<sup>2</sup> and are therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"). Petitioner additionally claims to be exempt from cable rate regulation in the communities listed on Attachment C and hereinafter referred to as "Group C Communities" because the Petitioner serves fewer than 30 percent of the households in the franchise area. The petitions are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission's rules.<sup>4</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>5</sup> For the reasons set forth below, we grant the Petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

<sup>1</sup>See 47 U.S.C. § 543(a)(1).

<sup>2</sup>47 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(1).

<sup>3</sup>47 C.F.R. § 76.906.

<sup>4</sup>See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

<sup>5</sup>See 47 C.F.R. §§ 76.906 & 907.

## II. DISCUSSION

### A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;<sup>6</sup> this test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>7</sup>

5. Turning to the first prong of this test, it is undisputed that the Group B Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability. The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>8</sup> Petitioner has demonstrated that this is the case.<sup>9</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.<sup>10</sup> Time Warner indicates that the program offerings are available on the websites of both DIRECTV and Dish, and we have reviewed their websites and confirmed that their program offerings meet the test.<sup>11</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Group B Communities because of their national satellite footprint.<sup>12</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner states that it is the largest MVPD in all but six of the Group B Communities.<sup>13</sup> With regard to Columbus, Elk Creek, Mineral, Oakland, Sugar Grove and Waterford townships, the Petitioner is unable to prove which MVPD is the largest.<sup>14</sup> Petitioner sought to determine the competing provider

<sup>6</sup>47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>7</sup>47 C.F.R. § 76.905(b)(2)(i).

<sup>8</sup>*Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

<sup>9</sup> Petition CSR 7726-E at 5-6, 8-9; Petition CSR 7722-E at 4-5, 7-8.

<sup>10</sup>*See* 47 C.F.R. § 76.905(g). *See also* Petition CSR 7726-E at 6; Petition CSR 7722-E at 5.

<sup>11</sup>*See* Petition CSR 7726-E at 7; Petition CSR 7722-E at 5-6.

<sup>12</sup>*See* Petition CSR 7726-E at 7; Petition CSR 7722-E at 6.

<sup>13</sup>Petition CSR 7726-E at 8; Petition CSR 7722-E at 7.

<sup>14</sup>Petition CSR 7726-E at 8; Petition CSR 7722-E at 7.

penetration in the Group B Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Group B Communities on a five-digit zip code basis and using a five-digit allocation formula previously approved by the Commission.<sup>15</sup>

7. Based on the data provided, the failure to identify the largest MVPD in Columbus, Elk Creek, Mineral, Oakland, Sugar Grove and Waterford townships is not fatal. While it is undetermined which provider is the largest in these townships, the DBS subscriber penetration levels that were calculated using Census 2000 household data<sup>16</sup> reflect that the aggregate subscribership for the DBS Providers in these six communities ranges from 17.92 to 42.31 percent and Petitioner’s subscriber total in each exceeds 15 percent.<sup>17</sup> Because Petitioner and the DBS providers each serve more than 15 percent of the households in Columbus, Elk Creek, Mineral, Oakland, Sugar Grove and Waterford townships, the subscriber base of any MVPD, other than the largest, exceeds the 15 percent threshold in these communities.

8. With respect to the other Communities, based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>18</sup> as reflected in Attachment A, we find that Petitioners have demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

9. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Group B Communities.

#### **B. The Low Penetration Test**

10. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.<sup>19</sup> Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in each of the Group C Communities.

11. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment C, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in each of the Group C Communities. Therefore, the low penetration test is also satisfied as to the Group C Communities.

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<sup>15</sup>Petition CSR 7726-E at 9; Petition CSR 7722-E at 8. *See also*, Charter Communications Properties, LLC, 17 FCC Rcd 4617 (2002); Charter Communications, 17 FCC Rcd 15491 (2002); Falcon First, Inc., 17 FCC Rcd 16629 (2002); Falcon Community Cable, L.P., 17 FCC Rcd 22162 (2002); Charter Communications, LLC, 19 FCC Rcd 7003 (2004).

<sup>16</sup>Petition CSR 7726-E at 8-9, Exhibit E; Petition CSR 7722-E at 7-8, Exhibit E.

<sup>17</sup>*See* Petition CSR 7726-E at 8-9, Exhibits A & E; Petition CSR 7722-E at 7-8, Exhibits A & E.

<sup>18</sup> Petition CSR 7726-E at 8-9, Exhibit E; Petition CSR 7722-E at 7-8, Exhibit E.

<sup>19</sup>47 U.S.C. § 543(l)(1)(A).

### III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petitions for determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc. **ARE GRANTED**.

13. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>20</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>20</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

## CSRs 7726-E, 7722-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<b>Communities</b>	<b>CUID(S)</b>
Albion	PA2262
Clark	PA1438
Columbus	PA0217
Concord	PA0218
Conneaut	PA2329
Conneautville	PA0581
Corry	PA0219
Cranberry	PA0206
Cranesville	PA2263
Delaware	PA3199
Elgin	PA 2196
Elk Creek	PA2330
Fairview	PA1796
Farrell	PA1439
Franklin	PA0207
Fredonia	PA2316
Frenchcreek	PA0208
Girard	PA1797
Girard	PA1798
Greene	PA2326
Greenville	PA0072
Harborcreek	PA1549
Hempfield	PA0073
Hermitage	PA0485
Jackson	PA2880
Jefferson	PA2869
Lackawannock	PA2870
Lake City	PA1799
Lawrence Park	PA1091
McKean	PA2327
McKean	PA2328

Millcreek	PA0932
Mineral	PA3147
North East	PA1749
North East	PA1750
Oakland	PA2881
Platea	PA2367
Polk	PA2617
Pymatuning	PA1738
Sandycreek	PA0209
Sharpsville	PA0487
Shenango	PA2507
South Pymatuning	PA2506
Spring	PA3443
Springboro	PA0595
Springfield	PA2325
Sugarcreek	PA0210
Sugar Grove	PA2474
Summit	PA2140
Union	PA0075
Union City	PA0074
Waterford	PA2195
Waterford	PA2269
Wayne	PA0220
Wesleyville	PA0933
West Middlesex	PA1553
West Salem	PA0076
Wheatland	PA1440
Wilmington	PA3306
Wilmington	PA2895

## ATTACHMENT B

## CSRs 7726-E, 7722-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID	CPR*	2000 Census Household	Estimated DBS Subscribers
Albion	PA2262	35.53	655	233
Clark	PA1438	16.08	227	37
Columbus	PA0217	54.05	663	358
Conneautville	PA0581	46.24	352	163
Corry	PA0219	25.27	2660	672
Cranesville	PA2263	34.98	216	76
Elgin	PA2196	25.25	84	21
Elk Creek	PA2330	23.58	653	154
Fairview	PA1796	16.24	3535	574
Farrell	PA1439	15.15	2504	379
Franklin	PA0207	23.35	3030	708
Fredonia	PA2316	39.78	252	100
Frenchcreek	PA0208	29.00	662	192
Girard	PA1798	25.58	1955	500
Girard Borough	PA1797	26.80	1226	329
Greene	PA2326	23.24	1724	401
Greenville	PA0072	25.23	2464	622
Harborcreek	PA1549	20.43	5398	1103
Hempfield	PA0073	25.23	1590	401
Hermitage	PA0485	15.31	6809	1042
Jefferson	PA2869	16.52	958	158
Lackawannock	PA2870	17.24	909	157
Lake City	PA1799	19.45	1025	199
Lawrence Park	PA1091	16.97	1547	262
McKean	PA2328	21.69	1649	358
McKean Borough	PA2327	31.38	150	47
Millcreek	PA0932	15.76	21217	3344
Mineral	PA3147	54.30	208	113
North East	PA1750	30.46	2485	757
North East Borough	PA1749	30.46	1730	527
Oakland	PA2881	24.12	575	139
Platea	PA2367	28.19	172	48
Polk	PA2617	54.30	196	106
Pymatuning	PA1738	26.05	1519	396
Sandycreek	PA0209	26.92	832	224
Sharpville	PA0487	16.08	1912	307
Shenango	PA2507	21.53	1637	352
South Pymatuning	PA2506	23.35	1131	264
Springboro	PA0595	44.91	183	82
Springfield	PA2325	29.11	1253	365
Sugarcreek	PA0210	22.70	2093	475
Sugar Grove	PA2474	54.88	649	356
Summit	PA2140	21.50	2110	454
Union City	PA0074	32.50	1326	431
Waterford	PA2269	35.30	1362	481
Waterford Borough	PA2195	37.77	558	211
Wayne	PA0220	28.33	642	182
Wesleyville	PA0933	18.78	1441	271

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Communities	CUID	CPR*	2000 Census Household	Estimated DBS Subscribers
West Middlesex	PA1553	19.27	372	72
West Salem	PA0076	28.10	1314	369
Wheatland	PA1440	15.15	349	53
Wilmington	PA3306	22.65	380	86
	PA2895			

\*CPR = Percent of competitive DBS penetration rate.



## ATTACHMENT C

## CSRs 7726-E, 7722-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID	Franchise Area Households	Cable Subscribers	Penetration Percentage
Concord	PA0218	490	22	4.49
Conneaut	PA2329	740	83	11.22
Cranberry	PA0206	2843	84	2.95
Delaware	PA3199	806	55	6.82
Jackson	PA2880	422	54	12.80
Spring	PA3443	577	6	1.04
Union	PA0075	598	42	7.02